

NO. 48645-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JESSE EISENHOWER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 15-1-00272-3

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the community custody condition that Eisenhower remain out of places where alcohol is the chief item of sale is not reasonably related to the circumstances of the crime of Possession of Methamphetamine when Eisenhower has a history of substance abuse, prior convictions for Possession of a Controlled Substance, and a chemical dependency contributed to the current offense?

## **II. STATEMENT OF THE CASE**

On Feb. 23, 2016, Mr. Eisenhower entered a plea of guilty to Taking a Motor Vehicle Without Permission in the Second Degree, Possession of a Controlled Substance – Methamphetamine, and Escape in the Third Degree. CP 26.

After the entry of the plea of guilty the deputy prosecutor informed the court that Mr. Eisenhower admittedly had a drug abuse problem and had requested a furlough to go to inpatient treatment. RP 9 (2/23/16). The court granted Eisenhower's request for a furlough to participate in drug abuse treatment. RP 9 (2/23/16). However, Eisenhower did not successfully complete treatment as he aborted treatment and did not report back to jail and the court. RP 10, 16 (2/23/16). When Eisenhower was found by law enforcement, he was found to be in possession of illegal drugs. RP 10 (2/23/16). Eisenhower's defense counsel also indicated to the court that

Eisenhower had been sentenced to two separate Drug Offender Sentence Alternative sentences (DOSA) in the past 10 years. RP 18 (2/23/16).

Eisenhower's criminal history includes prior felony Possession of Controlled Substance convictions from 2004 and 2009. CP 14, 21. Due to Eisenhower's offender score of 9, he was sentenced to a 29 month prison term. CP 14, 16; RP 21 (2/23/16).

As part of Eisenhower's sentence, the court imposed a 12 month term of community custody pursuant to RCW 9.94A.701 because Eisenhower was sentenced to 24 months prison for the charge of Possession of a Controlled Substance. CP 16. The judgment and sentence indicates that the defendant has a chemical dependency that contributed to the offense(s). CP 13. The court ordered Eisenhower to undergo an evaluation for treatment for substance abuse, drugs and alcohol, and fully comply with all recommended treatment. CP 17; RP 20 (2/23/16).

The court also imposed the condition that "[Eisenhower] shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale." CP 18. Defense counsel objected and the parties discussed the treatment for drug abuse including alcohol. RP 24–26 (2/23/16). Defense counsel argued that remaining out of places where alcohol is the chief item of sale was not crime related. RP 24 (2/23/16). The trial court ultimately decided that reasonable minds could differ on that issue and found that there

was “a nexus between prohibiting the consumption of alcohol and frequently those places” and that the condition would be left in the judgment and sentence. RP 25 (2/23/16).

### III. ARGUMENT

Eisenhower argues that the condition that he remain out of places where alcohol is the chief item of sale is invalid because it is not directly related to the circumstances of the crime of Possession of a Controlled Substance. Br. of Appellant at 5–6.

This court reviews a trial court's imposition of crime-related community custody conditions for abuse of discretion. *State v. Cordero*, 170 Wash.App. 351, 373, 284 P.3d 773 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wash.2d 22, 37, 846 P.2d 1365 (1993). This court reviews the factual bases for crime-related conditions under a “substantial evidence” standard. *State v. Motter*, 139 Wash.App. 797, 801, 162 P.3d 1190 (2007), disapproved of by *Sanchez Valencia*, 169 Wash.2d 782, 239 P.3d 1059; *see also State v. Brockob*, 159 Wash.2d 311, 343, 150 P.3d 59 (2006) (holding that an “appellate court reviews whether substantial evidence supports the trial court’s findings of fact”).

*State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

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**A. THE PROHIBITION FROM PLACES WHERE ALCOHOL IS THE CHIEF ITEM OF SALE IS RELATED TO THE CIRCUMSTANCES OF POSSESSION OF METHAMPHETAMINE BECAUSE EISENHOWER HAS A LENGHTY HISTORY OF SUBSTANCE ABUSE, A CHEMICAL DEPENDENCY CONTRIBUTED TO THE CURRENT OFFENSE, AND THE CONDITION IS DESIGNED TO PREVENT CONSUMPTION OF INTOXICANTS.**

RCW 9.94A.703 (3)(e) gives the trial court discretion to order Eisenhower to “refrain from possessing or consuming alcohol” as part of his community custody conditions. Further, RCW 9.94A.703 (3)(f) requires a defendant to “comply with any crime-related prohibitions.”

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "Crime-related prohibitions" may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

RCW 9.94A.505 (9).

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030 (10).

“But a causal link is not necessary as long as the condition relates to the circumstances of the crime.” *State v. Kolesnik*, 146 Wn. App. 790, 808,

192 P.3d 937 (2008) (citing *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). “Directly related” includes conditions that are “reasonably related” to the crime.” *Irwin*, 191 Wn. App. at 656 (citing *Kinzle*, 181 Wn. App. at 785).

“The court has struck crime-related community custody conditions when there is “no evidence” in the record that the circumstances of the crime related to the community custody condition.” *Id.* at 656–57 (citing *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008)).

“Conversely, this court has upheld crime-related community custody decisions when there is some basis for the connection.” *Id.* at 657; *see, e.g., State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). “Such conditions are usually upheld if reasonably crime related.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)(citations omitted).

Here, Eisenhower pleaded guilty to Possession of a Controlled Substance - Methamphetamine. CP 12, 26, 37. Further, Eisenhower has prior felony convictions for Possession of a Controlled Substance (POCS). CP14. The judgment and sentence shows that a chemical dependency contributed to the offense. CP 13. The trial court imposed the restriction on alcohol and entering places where it is the chief item of sale. This condition is designed to prevent Eisenhower from consuming intoxicants.

Defense counsel argued that the condition was not directly related to



the circumstances of the crime. The trial court considered the specific issue at hand and, after considering the arguments, found that reasonable minds could differ and left the condition in place.

Further, empirical evidence has shown that alcohol lessens inhibition which often leads to situations where drug addicts will not be able to abstain from using drugs. *See People v. Beal*, 60 Cal. App. 4th 84, 87, 70 Cal. Rptr. 2d 80 (1997), as modified on denial of reh'g (Jan. 7, 1998).

Therefore, the condition at issue is reasonably crime-related and is reasonably related to the drug-related circumstances of the offense of Possession of Methamphetamine. *Warren*, 165 Wn.2d at 32.

Although this precise issue at hand is hard to find under Washington case law, there are a number of cases from other jurisdictions where courts have specifically found a nexus between the use of alcohol and controlled substances.

[E]mpirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well-documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. (*See People v. Smith* (1983) 145 Cal.App.3d 1032, 1034, 193 Cal.Rptr. 825, citing *Pollack*, Drug Use and Narcotic Addiction (1967) University of Southern California Institute of Psychiatry and Law for the Judiciary, pp. 1–2, 4–5.) Presumably for this very reason, the vast majority of drug treatment programs, including the one Beal participates in as a condition of her probation, require abstinence from alcohol use. (Am. U. Sch. of Pub. Affairs, 1997 Drug Court Survey Report: Executive Summary, p. 49.) 3 Based on the relationship between alcohol and drug use, we conclude that substance abuse is reasonably related to

the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense.

*People v. Beal*, 60 Cal. App. 4th 84, 87, 70 Cal. Rptr. 2d 80 (1997), as modified on denial of reh'g (Jan. 7, 1998); *see also People v. Smith*, 145 Cal. App. 3d 1032, 1035, 193 Cal. Rptr. 825 (Ct. App. 1983); *United States v. Forde*, 664 F.3d 1219, 1224 (8th Cir. 2012).

This issue was also visited in *State v. Winkel*, where a Montana trial court imposed the condition that “the Defendant shall not possess or consume intoxicants/alcohol, nor will he enter any place intoxicants are the chief item of sale.” *State v. Winkel*, 342 Mont. 267, 269, 182 P.3d 54 (2008).

Winkel argues that this condition is illegal, because alcohol played no role in his offense. Further, he attests, he never sold methamphetamine in bars. Finally, Winkel claims he has no history of alcohol abuse that would affect his rehabilitation.

*Winkel*, at 270.

The Montana Supreme Court disagreed with Winkel in the 2008 *Winkel* decision holding that the condition was valid on the basis that “[t]he drug-related nature of Winkel's offense alone suffices as a sufficient nexus to this condition.” *Winkel*, 342 Mont. at 271; *see also State v. Greensweight*, 2008 343 Mont. 474, 187 P.3d 613 (2008) (holding the same condition to be valid even though there was no evidence that defendant had abused alcohol because defendant had a recent and chronic history of serious drug abuse, and

there was a reasonable possibility that defendant might substitute alcohol for drugs in the absence of no-intoxicants condition); *But see Grate v. State*, 623 So. 2d 591, 592 (Fla. Dist. Ct. App. 1993) (holding as invalid the condition that Grate not enter any bar or liquor lounge without permission from his probation officer because it was not reasonably related to the offense of Possession of Cocaine); *Boyd v. State*, 749 So. 2d 536, 536 (Fla. Dist. Ct. App. 2000) (holding that prohibition from frequenting places where alcohol is the main source of business was unrelated to the offense of solicitation or delivery of cocaine).

Eisenhower cites to *State v. Jones* which might support his argument but for the fact that Jones was convicted of First Degree Burglary rather than Possession of Methamphetamine as in Eisenhower's drug-related case. *State v. Jones*, 118 Wn. App. 199, 202–03, 76 P.3d 258 (2003).

The defendant also cites to *State v. Parramore*, where defendant was convicted of selling or delivery of marijuana. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). In *Parramore*, the trial court imposed the condition that the defendant submit to breathalyzer testing as part of his community supervision. On appeal, the *Parramore* Court held that such condition was not a permissible crime-related prohibition because there was no connection between defendant's use of alcohol and his drug conviction.

However, the *Parramore* case was also different from the instant case

because in *Parramore* there is no mention of any of the factors which are present in the instant case such as a finding that a chemical dependency contributed to the offense, a record of prior drug convictions, a lengthy substance abuse history, and substance abuse treatment was clearly not ordered in *Parramore*. 53 Wn. App. at 531 (“It is undisputed that *Parramore* has not been required to attend rehabilitative programs.”).

The case law is clear that a sentencing condition may be reversed due to abuse of discretion. This may be demonstrated by the cases cited by Eisenhower where the crimes were Burglary or there was no finding that chemical dependency contributed to the offense. However, the sentence condition in this case is reasonably related to substance abuse and the crime of Possession of Methamphetamine as evidenced by the chemical dependency finding and prior convictions for Possession of a Controlled Substance. Further, Eisenhower was required to undergo an evaluation for substance abuse and follow recommended treatment. Alcohol use and frequenting places where alcohol is the chief item of sale is inconsistent and counterproductive with regard to treatment for substance abuse. *See Beal*, 60 Cal. App. 4th at 87; *see also Smith*, 145 Cal. App. 3d at 1035; *Forde*, 664 F.3d at 1224; *Winkel*, 342 Mont. at 269.

The trial court did not abuse its discretion by imposing the condition that Eisenhower remain out of places where alcohol is the chief item of sale

because consumption of alcohol is reasonably crime related and the prohibition is related to the circumstances of the crime, substance abuse.

Therefore, the Court should affirm.

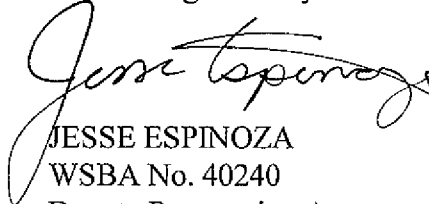
#### IV. CONCLUSION

For all the foregoing reasons, the Court should affirm the prohibition that Eisenhower remain out of places where alcohol is the chief item of sale.

Respectfully submitted this 9th day of September, 2016.

Respectfully submitted,

MARK B. NICHOLS  
Prosecuting Attorney

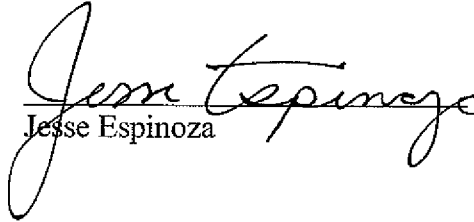


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## CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on September 9, 2016.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

# CLALLAM COUNTY PROSECUTOR

**September 09, 2016 - 4:32 PM**

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